

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LUSHRIE JARDAN)	
Claimant)	
VS.)	
)	Docket No. 1,048,563
WALMART)	
Respondent)	
AND)	
)	
ILLINOIS NATIONAL INS. CO.)	
Insurance Carrier)	

ORDER

Claimant appealed the May 11, 2012, post-award medical Award entered by Administrative Law Judge (ALJ) Steven J. Howard. The Board placed this appeal on its summary docket for disposition without oral argument. Due to a conflict, Board Member Gary R. Terrill recused himself from this appeal and E. L. Lee Kinch of Wichita, Kansas, was appointed as a Board Member Pro Tem by the Director.

APPEARANCES

Steven J. Borel of Olathe, Kansas, appeared for claimant. Michael R. Kauphusman of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are set forth in the May 11, 2012, post-award medical Award.

ISSUES

Claimant suffered a work-related low back injury on October 26, 2009. On December 20, 2011, ALJ Steven J. Howard issued an Award finding claimant had a compensable claim and that he was permanently and totally disabled. On January 25, 2012, claimant filed an Application for Post Award Medical, requesting that respondent

provide a stair lift¹ for claimant's home in order for claimant to get to his second floor bedroom. Respondent asserted that a stair lift was not reasonably necessary to cure and relieve claimant from the effects of his back injury. Respondent also argued claimant failed to prove his need for a stair lift was the direct and natural result of his work-related low back injury.

Claimant argues the stair lift would cure or relieve the effects of claimant's back injury. Further, claimant asserts that the ALJ found in the original Award that claimant's work-related low back injury caused his difficulties in ambulation and, therefore, that issue is res judicata. The ALJ denied claimant's request that respondent provide the stair lift. The ALJ determined that a stair lift was not reasonably necessary to cure and relieve claimant from the effects of his back injury. He also found claimant failed to prove his need for a stair lift was the direct and natural result of his work-related low back injury. Claimant appeals.

1. Is a stair lift reasonably necessary to cure and relieve claimant from the effects of his back injury?
2. Is claimant's need for a stair lift the direct and natural result of his work-related low back injury?
3. Is claimant entitled to reasonable post-award attorney fees and costs?

FINDINGS OF FACT

After reviewing the record and considering the parties' briefs, the Board finds:

Claimant was in his 70s when he suffered a low back injury on October 26, 2009, when he stepped in a hole while picking up cardboard. Claimant also reported numbness in his posterior calves and tightness in his knees, making it difficult for him to ambulate. He has received physical therapy, injections and medications. Claimant was seen by a surgical specialist who indicated surgery would not benefit claimant. An Award was entered on December 20, 2011, wherein the ALJ determined claimant was permanently and totally disabled. The ALJ stated in the original Award, "Here, the creditable *[sic]* medical evidence indicates that claimant's leg condition, weakness, shuffling, and difficulties in ambulating, are more probably true than *[sic]* not related to the aggravation of his lumbar spine caused by his occupational incident."²

¹ In the record and in documents in the file, there are references to both stair lift and chair lift when referring to the device claimant is requesting. Unless used differently in a quote, the device claimant is requesting will be referred to as a stair lift.

² ALJ Award (Dec. 20, 2011) at 8.

Claimant's bedroom is on the second floor of his home. Claimant testified that after his accident at work, he was able to walk up and down the stairs in his home some. In November 2011, prior to the original Award, claimant obtained an estimate to have a stair lift installed in his home. The parties stipulated into the record three estimates for installation of a stair lift, ranging from \$11,000.00 to \$16,704.94.

Claimant had mini-strokes in the past. Claimant denied the mini-strokes affected his ability to walk. Claimant averred that his difficulty with walking was not a recent event and began after his fall at work on October 26, 2009. He testified that the leg problems started at the calves and went to his toes. Claimant denied having diabetes.

On January 14, 2012, claimant had a fall in his home, which resulted in his using a wheelchair. Claimant testified his legs just gave out and he fell down. He was treated by Dr. James Zarr and Mid-America Rehabilitation Hospital. Dr. Zarr diagnosed claimant with osteoarthritis, gait disturbance and generalized weakness/debility; residuals of previous strokes; and early rhabdomyolysis/disuse myopathy.³ He did not testify and did not give an opinion in his report as to whether claimant's increased lower extremity problems were the result of claimant's 2009 work-related injury. At the time of the post-award hearing, claimant had been at Delmar Gardens Rehabilitation recovering from the fall.

At the request of his attorney, claimant saw Dr. Michael J. Poppa on July 5, 2010; February 3, 2011; and February 21, 2012. At the February 21, 2012, appointment claimant complained that he could walk only a block or two with a walker and that climbing stairs was miserable and that he needed a railing to hold on to. Dr. Poppa noted the reflexes and muscle strength in claimant's lower extremities had decreased.

In a letter to claimant's attorney dated January 17, 2012, Dr. Poppa made reference to his July 5, 2010, and February 3, 2011, evaluations of claimant's medical conditions and opined claimant's resulting medical conditions warranted a stair lift. In a February 21, 2012, letter to claimant's attorney, Dr. Poppa opined claimant's need for a stair lift was a result of his initial work injury causing weakness in claimant's lower extremities, shuffling gait and difficulties with ambulation.

Dr. Poppa admitted that before he authored the January 17, 2012, letter, he was unaware if claimant had a change in his medical condition since February 3, 2011. He also acknowledged that when he rendered his opinions on February 21, 2012, he only had reviewed a select portion of the records from Dr. Zarr and Mid-America Rehabilitation Hospital, as not all the records were provided to him. He indicated claimant's leg problems were primarily muscular and did not follow a typical radicular pattern.

³ Poppa Depo. (Mar. 29, 2012), Ex. A at 2.

Dr. Poppa was questioned about the effect of strokes on the extremities. He testified strokes can cause inability to use an extremity (resulting in unilateral muscle atrophy and weakness), visual disturbances and speech disturbances. Dr. Poppa opined that claimant's rhabdomyolysis (a condition that occurs as a result of injury to a muscle) was related to claimant's work injury. He acknowledged that claimant has osteoarthritis, but indicated it would not interfere with claimant's ability to ambulate. Dr. Poppa also agreed uncontrolled diabetes can cause polyneuropathy and ischemic changes in body parts, but testified claimant's diabetes was controlled. He also indicated disuse myopathy can cause a person to have difficulties ambulating.

Pursuant to an Order by ALJ Howard, claimant was evaluated by physical medicine and rehabilitation specialist Dr. Terrence Pratt on May 12, 2011. Dr. Pratt's report based on that examination indicated claimant used a cane intermittently and required assistance for lower extremity activities of daily living. Claimant reported low back and bilateral lower extremity symptoms to Dr. Pratt. Dr. Pratt noted claimant's movements were slow and claimant intermittently held onto objects in the exam room.

Respondent had claimant examined by Dr. Pratt on March 20, 2012. Dr. Pratt reviewed the January 17 and February 21, 2012, letters of Dr. Poppa and physically examined claimant. Claimant presented to Dr. Pratt in a wheelchair and also had a cane. Claimant was unable to stand from the wheelchair level. When Dr. Pratt assisted claimant in standing, he was unsteady on his feet. Consequently, Dr. Pratt was unable to assess claimant's gait. Dr. Pratt stated in his report that motor assessment to the lower extremities revealed giveaway weakness, left greater than the right extremity, without the ability to determine his true functional abilities. He also noted claimant's deep tendon reflexes were symmetrically diminished.

Dr. Pratt's assessment of claimant was: (1) low back pain with degenerative disease and spinal stenosis, (2) history of rhabdomyolysis, myopathy and debilitation, (3) history of hypertension, lacunar infarcts and probable polyneuropathy and (4) impaired mobility and activities of daily living. He testified claimant's rhabdomyolysis had no known cause as it was diagnosed before claimant fell in January 2012. Dr. Pratt also indicated claimant's work-related back injury would not result in myopathy. He was also of the opinion that claimant's lacunar infarcts were a possible cause of claimant's lower extremity weakness. Dr. Pratt indicated that polyneuropathy could also be the cause of claimant's lower extremity weakness. However, polyneuropathy would not be causally connected to claimant's work accident. Dr. Pratt also opined that claimant's history of prostate and colon cancer could result in debilitation of the lower extremities. Finally, Dr. Pratt indicated age and deconditioning cause muscles to weaken.

Dr. Pratt agreed claimant needed a stair lift in his home. In his March 20, 2012, report, Dr. Pratt wrote that he could not state within a reasonable degree of medical certainty that claimant's lumbosacral involvement was the prevailing factor in his need for a stair lift. The following testimony of Dr. Pratt is significant:

Q. (Mr. Borel) Is his back injury and the consequences that has played in terms of his weakness and lack of conditioning and related issues, is that part of the factors that go into his need for the stair lift?

A. (Dr. Pratt) In his overall presentation, the lumbosacral involvement would be the least of it, but it does play a role in his presentation.

Q. So you're saying that his lumbosacral injury in 2009 is a contributing cause of his need for the stair lift, but in your opinion not a major cause of it?

A. That's correct.⁴

Upon further questioning by Mr. Borel, Dr. Pratt identified the October 2009 low back injury as one of the causes of claimant's need for the stair lift, along with deconditioning, history of cerebrovascular events, myopathy and polyneuropathy.

Dr. Pratt also acknowledged that claimant's 2009 work injury was a factor in causing his deconditioning and, in turn, that deconditioning was one of the factors causing claimant's lower extremity weakness.

The ALJ determined that a stair lift was not reasonably necessary to cure and relieve claimant from the effects of his back injury. He also found claimant failed to prove his need for a stair lift was the direct and natural result of his work-related low back injury. The ALJ noted that Dr. Pratt indicated claimant's need for the stair lift is a multifactorial issue and not based solely on claimant's occupational injuries. ALJ Howard also stated in his post-award medical Award, "The physician [Dr. Pratt] went on to state that claimant's lumbosacral injury is [a] contributing cause of his need for the chair lift, but not the major cause."⁵

The ALJ found in the December 20, 2011, Award that claimant's work-related low back injury caused his difficulties in ambulation. At Dr. Pratt's deposition claimant indicated this issue was res judicata and respondent objected it did not apply. Claimant did not present this argument at the post-award hearing. Consequently, ALJ Howard did not address this issue in the post-award medical Award.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

⁴ Pratt Depo. at 21.

⁵ ALJ Award (May 11, 2012) at 5.

right depends.⁶ “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁷

Respondent contended, and the ALJ found, that a stair lift is not reasonably necessary to cure and relieve claimant from the effects of his back injury. The Board disagrees. K.S.A. 2009 Supp. 44-510h requires that employers provide such medical treatment “as may be reasonably necessary to cure and relieve the employee from the effects of the injury.”

Whether or not an item or device cures or relieves an injured worker from the effects of an injury should be determined on a case-by-case basis.⁸ In the past, the Board has required employers to pay for items that may not be considered medical treatment in the traditional sense. The Board has found that a mattress prescribed by a physician for an injured employee⁹ and making a vehicle handicap accessible¹⁰ were forms of medical treatment reasonably necessary to cure and relieve injured employees from the effects of their injuries. In *Finney*,¹¹ the Kansas Court of Appeals agreed with the Board that replacing worn carpeting in an injured employee’s home with hard floor covering so he could operate his wheelchair more easily was a form of medical treatment reasonably necessary to cure and relieve the injured employee from the effects of his injury.

Here, as in *Finney*, claimant is requesting a home improvement as a form of medical treatment. The stair lift in the present claim, like the hard floor covering in *Finney*, is a home improvement that helps relieve claimant from the effects of his work-related injury. Prior to his work-related injury, claimant was able to climb his stairs to his bedroom. Now claimant is unable to do so. The Board finds the requested stair lift is reasonably necessary to cure and relieve the claimant from the effects of his work-related injury.

Claimant asserts it is res judicata that claimant’s work injury caused his difficulties in ambulation. This issue was not raised by claimant at the post-award hearing. Nor was

⁶ K.S.A. 2009 Supp. 44-501(a).

⁷ K.S.A. 2009 Supp. 44-508(g).

⁸ *Conner v. Devlin Partners, LLC*, Docket No. 1,007,224, 2005 WL 831913 (Kan. WCAB Mar. 11, 2005).

⁹ *Id.*

¹⁰ *Froese v. Trailers & Hitches, Inc.*, Docket No. 1,036,333, 2008 WL 651685 (Kan. WCAB Feb. 29, 2008).

¹¹ *Finney v. Finns Electric Company, Inc.*, No. 98,330, 2008 WL 4140639 (Kansas Court of Appeals unpublished opinion filed Sept. 5, 2008, rev. denied Apr. 28, 2009).

it addressed by ALJ Howard in his post-award medical Award. Consequently, the Board declines to address this issue on appeal. The Board acknowledges that ALJ Howard, in his original Award, found claimant's low back injury caused him difficulty ambulating. However, such a finding does not relieve claimant of the burden to prove that his need for a stair lift was the direct and natural result of his work-related low back injury.

Respondent offered several alternate explanations for claimant's difficulty in ambulating and need for a stair lift. Its attorney elicited testimony from Drs. Poppa and Pratt that polyneuropathy, myopathy and lacunar infarcts could cause claimant's increased lower extremity muscle weakness and ambulation problems. Respondent also attempted to show claimant's osteoarthritis, diabetes, and history of rhabdomyolysis, prostate cancer and colon cancer might even be a cause of claimant's lower extremity muscle weakness. Claimant's diabetes was under control and Dr. Poppa indicated osteoarthritis would not interfere with claimant's ability to ambulate. He also opined claimant's need for a stair lift was a result of his work-related low back injury. Dr. Pratt testified claimant's 2009 work-related injury was a contributing factor in and cause of his need for a stair lift. He also testified that claimant's 2009 work injury was a factor in causing his deconditioning and, in turn, that deconditioning was one of the factors causing claimant's lower extremity weakness.

ALJ Howard found claimant's work injury was only a contributing cause and not the sole cause of his need for the stair lift. Consequently, he erroneously found that claimant's request for a stair lift should be denied. Since claimant's work-related injury contributed to his need for the stair lift, the Board grants claimant's request for a stair lift. Stated another way, the Board finds claimant proved by a preponderance of the evidence that his need for a stair lift was the direct and natural result of his work-related low back injury.

K.S.A. 2009 Supp. 44-510k(c) provides:

The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto. As used in this subsection, "costs" include, but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.

In *Higgins*,¹² the Kansas Supreme Court stated, "The plain language of the first sentence of K.S.A. 2008 Supp. 44-510k(c) explicitly endows an ALJ with the discretion to grant attorney fees and costs to a workers compensation claimant in a post-award medical benefits proceeding." ALJ Howard denied claimant's request for post-award medical benefits and attorney fees. In light of the Board granting claimant's Application for Post

¹² *Higgins v. Abilene Machine, Inc.*, 288 Kan. 359, 362, 204 P.3d 1156 (2009).

Award Medical, the Board also grants claimant's request for attorney fees and costs. The Board remands the issue of post-award attorney fees to the ALJ to make a determination as to the amount of attorney fees and costs to be awarded claimant.

CONCLUSION

1. Claimant has proven by a preponderance of the evidence that a stair lift is reasonably necessary to cure and relieve him from the effects of his back injury.

2. Claimant proved by a preponderance of the evidence that his need for a stair lift was the direct and natural result of his work-related low back injury.

3. The Board grants claimant's request for post-award attorney fees and costs, but remands that issue to the ALJ to determine the amount of attorney fees and costs to be awarded claimant. If claimant desires attorney fees for prosecuting his appeal to the Board, claimant must present that request to the ALJ.

WHEREFORE, the Board reverses the May 11, 2012, post-award medical Award entered by ALJ Howard. The matter is remanded to the ALJ for further orders consistent herewith.

IT IS SO ORDERED.

Dated this ____ day of July, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Steven J. Howard, Administrative Law Judge